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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. KENNETH JOHN FALCONE, Appellant.	2 CA-CR 2007-0055 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052588

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Amy M. Thorson
Tucson
Attorneys for Appellee

Wanda K. Day
Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Kenneth Falcone was convicted of attempted sexual conduct with a minor under fifteen years of age, public sexual indecency to a minor under fifteen, luring a minor under fifteen for sexual exploitation, and two counts of sexual conduct with a minor under the age of eighteen. Falcone was sentenced to consecutive, fifteen-year terms of imprisonment on his convictions for attempted sexual conduct and luring a minor, to be served concurrently with lesser terms on his convictions for public sexual indecency and sexual conduct. He argues the trial court erred when it denied his motion for a mistrial on the ground of juror misconduct and when it failed, sua sponte, to inquire further into the jurors' knowledge of his prior criminal history.

¶2 We view the facts in the light most favorable to sustaining the convictions. *State v. Brown*, 217 Ariz. 617, ¶ 2, 177 P.3d 878, 880 (App. 2008). The victims testified to the following facts at trial. In June 2005, fourteen-year-old E. and sixteen-year-old M. were living at a children's shelter. They went to a YMCA in the morning to swim and there met a man both later identified as Falcone. While M. and Falcone were in the whirlpool bath together, the man touched M. on his "privates." Thereafter, Falcone asked the boys if they wanted to go home with him, and he picked them up in his vehicle on the corner outside the YMCA.

¶3 At his house, Falcone attempted to touch E. under his pants and said he wanted to perform oral sex on E., but E. resisted Falcone's efforts and refused to participate. In Falcone's bedroom, Falcone touched M.'s "privates" and put his finger in M.'s rectum. At one point, M. undressed and Falcone rubbed his genitals against M.'s. E. walked in the room

and saw Falcone "masturbating" M. After Falcone and M. left the bedroom, E. asked Falcone to drive them to a street corner a few city blocks from the shelter. Before dropping them off, Falcone gave the boys his telephone number. M. and E. then walked back to the shelter.

¶4 Later that day, M. apparently told someone at the shelter about the incidents with Falcone, and shelter staff called the police. At the police station, E. and M. separately identified Falcone from a series of six photographs as the man they had met at the YMCA. And M. assisted detectives by making a "confrontation call" to Falcone.[1] During the telephone call, while detectives were listening, Falcone essentially admitted the sexual acts had occurred between him and M. and acknowledged having been at the YMCA that day. Falcone was subsequently arrested, indicted, and convicted of the five crimes as charged.

¶5 On appeal, Falcone argues the trial court erred when it denied his motion for a mistrial because several questions asked by jurors during trial "prove that the jurors knew about his prior criminal history and involvement in the criminal justice system." We will only reverse the trial court's denial of a motion for mistrial upon a clear abuse of discretion. *State v. Murray*, 184 Ariz. 9, 35, 906 P.2d 542, 568 (1995).

¶6 Juror misconduct warrants a mistrial or a new trial if the defense establishes actual prejudice or if prejudice fairly may be presumed from the facts. *State v. Vasquez*, 130 Ariz. 103, 105, 634 P.2d 391, 393 (1981); *State v. Ebert*, 110 Ariz. 408, 412, 519 P.2d 1149,

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[1]A "confrontation call" is a tactic used by law enforcement officers in criminal cases "when the victim in the case calls the possible suspect and tries to elicit information of an act that occurred[; it] is monitored by a police officer or a detective and it is recorded."

1153 (1974) (potential prejudice due to juror misconduct not necessarily grounds for mistrial or new trial). And, when a defendant alleges a jury has obtained and considered extrinsic evidence, he or she has the initial burden to prove such an allegation. *State v. Hall*, 204 Ariz. 442, ¶¶ 16-17, 65 P.3d 90, 95-96 (2003). If that initial burden is met, "prejudice must be presumed and a new trial granted unless the prosecutor proves beyond a reasonable doubt that the extrinsic evidence did not taint the verdict." *Id.* ¶ 16.

¶7 At the end of the first day of testimony in the trial, a juror submitted a note to the bailiff that asked if he could "advise the jury about text messaging during the trial testimony." Falcone's counsel and the court stated they had not seen anyone text messaging during the trial. The court stated it had "been watching carefully." The court instructed the jury the next day that jurors could not text message during the trial and should not "have any electronic devices on in the courtroom for any purpose where you can communicate or receive information from anyone." The court then stated that a juror had told the bailiff he or she wanted to use a power outlet for a computer. The court responded that was "fine. Just don't do any research on your computer about the case."

¶8 After M.'s testimony, when the court collected questions from the jurors, a juror asked, "What type of crime do you have to commit for the police to have your picture in their database?" Then, another juror asked, "Why is the defense attorney bringing up prior acts of behavior about [M.] if we are not being informed about Falcone[']s prior convictions?" The court declined to conduct any further inquiry at that time.

¶9 Falcone then moved for a mistrial on the ground the questions showed at least one juror had knowledge of his prior criminal history and he was prejudiced as a result. Falcone argued that the presence of his picture in the photographic line-up had caused at least one juror to believe "Falcone ha[d] a record." The court denied the motion, finding it was "not manifestly necessary to declare a mistrial." But, as a partial cure for any potential prejudice, the state elicited testimony from its next witness, the detective who had investigated the case, about how police obtain the photographs to use in line-ups. She testified that "[p]ictures come from the Arizona driver's license, Arizona IDs and any other public data information that is out there."

¶10 After the detective's testimony, a third juror asked, "Is Mr. Falcone['s] prior legal matter admiss[i]ble?" The court declined to ask the question, Falcone requested a curative instruction, and the court instructed the jurors as follows:

> And one point that I need to make right now, this relates back to the original instructions that I gave you. It will be reaffirmed in the final instructions. You cannot speculate about anything. You cannot assume facts that are not in evidence. And some of the questions that have been asked are suggesting either that a juror has gone outside of the court process to get information or it's [sic] assuming things that just haven't been brought to court. And you can't do that. You can't ask questions that are based on information that there is no good faith basis to ask the questions. That is why the lawyers are limited in the types of questions they can ask. Nor can you assume things to be true that there is no basis to ask a question from. So that is kind of a vague way to answer some of the reasons why I haven't asked the questions that some of you have asked. And there are other legal reasons as well for some of the other questions that I disallow for the attorneys.
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> . . . .

> But I will ask you and admon[ish] you not to assume anything that is not produced in court and don't conduct any independent research and don't guess about anything.

In response to Falcone's request for a further, more specific instruction, the court instructed the jury:

> One instruction that is not in the back, a couple of jurors or maybe sometimes jurors on a couple of different occasions were asking questions about the criminal history or criminal conviction of Mr. Falcone. There has been no evidence presented regarding any such convictions. So I'm requesting you to remember the admonition that I mentioned earlier and to only consider the evidence that is presented in court.

¶11 The trial court did not err when it implicitly concluded Falcone had not proven the jury received and considered extrinsic evidence about his criminal history. *See Hall*, 204 Ariz. 442, ¶¶ 16-17, 65 P.3d at 95-96. We presume the jurors followed the court's instructions not to conduct any research into the case, not to speculate about anything, and not to assume facts not in evidence—specifically whether Falcone had any prior convictions. *See State v. Newell*, 212 Ariz. 389, ¶ 69, 132 P.3d 833, 847 (2006) (jurors presumed to abide by court's instructions).

¶12 At trial, Falcone's counsel stated he believed at least one juror made the assumption that Falcone had a criminal history because of the photographic line-up. It was not until this appeal that Falcone argued the jurors were conducting independent research and cited the juror's note about text messaging in support. He failed to move for a new trial or obtain any affidavits from jurors concerning their potential knowledge of his criminal history. *See* Ariz. R. Crim. P. 24.1(c)(3)(i); *Hall*, 204 Ariz. 442, ¶¶ 16-17, 65 P.3d at 95-96

(defendant has burden to show jury received and considered extrinsic evidence); *State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (App. 1991) (allegation of improper juror communication during trial did not require new trial when appellant failed to substantiate allegation with affidavits or request juror voir dire); *cf. Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶¶ 24-26, 107 P.3d 923, 929-30 (App. 2005) (juvenile court did not abuse its discretion in denying motion for new trial on ground of juror misconduct when appellant "failed to demonstrate that her claim had any arguable merit" and did not "support[] her allegations with an affidavit from the juror or even ask[] the court to question the juror further"); *Foster v. Camelback Mgmt. Co.*, 132 Ariz. 462, 463-64, 646 P.2d 893, 894-95 (App. 1982) (in civil case, denial of motion for new trial on basis of juror misconduct affirmed when no testimony or affidavit of juror presented as supporting evidence). Given that Falcone had the burden of demonstrating juror misconduct, these failures are fatal to his claim for relief on that basis.

¶13 Nor did the trial court err in implicitly finding that Falcone had failed to show he was actually prejudiced by the jurors' questions or that prejudice could otherwise fairly be presumed from the facts. *See Vasquez*, 130 Ariz. at 105, 634 P.2d at 393. Even were we to assume the jurors had some knowledge of Falcone's criminal history, we would conclude it did not affect the verdicts. *See Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d at 95. The state presented substantial other evidence of the elements of each crime permitting us to hold beyond a reasonable doubt that the verdict would not have changed. *See State v. Lehr*, 201

Ariz. 509, ¶ 34, 38 P.3d 1172, 1181 (2002) (harmless error review involves determination whether other substantial evidence supports convictions).

¶14 A person commits sexual conduct or attempted sexual conduct with a minor by knowingly engaging or attempting to engage in sexual intercourse or oral sexual contact with a minor. A.R.S. § 13-1405; A.R.S. § 13-1001. "A person commits public sexual indecency to a minor if the person intentionally or knowingly engages in any [prohibited acts, including sexual contact] and such person is reckless about whether a minor under the age of fifteen years is present." A.R.S. § 13-1403(B). Finally, "luring a minor for sexual exploitation" consists of "offering or soliciting sexual conduct with another person knowing or having reason to know that the other person is a minor." A.R.S. § 13-3554(A).

¶15 In his closing argument, Falcone conceded he had some interaction with the boys and that he had acted inappropriately. M. and E. testified that Falcone had performed or attempted to perform sexual acts with each of them, and E. had witnessed one of at least two acts between M. and Falcone. The boys separately identified Falcone from a photographic line-up, and when M. confronted Falcone on the telephone, Falcone acknowledged the sexual acts had occurred.

¶16 Because Falcone has not demonstrated that any juror actually knew of his prior convictions, and because there was overwhelming evidence that Falcone had committed the acts alleged, Falcone has demonstrated neither jury misconduct nor that any potential misconduct would have affected the verdict.

¶17 Finally, Falcone argues for the first time on appeal that the trial court erred when it failed to sua sponte hold an evidentiary hearing to determine the jurors' knowledge of his criminal history. We review arguments not raised before the trial court only for fundamental error and resulting prejudice. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Because we have concluded Falcone was not prejudiced by any alleged juror misconduct in this case, he has not met his burden to show he suffered prejudice from the court's failure to make a further inquiry of the jurors.

¶18 Falcone's convictions and sentences are affirmed.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge